

June 2008 Jury Tip: “Discredit the Messenger, Discredit the Message”

Last month’s jury tip explained why jurors routinely dismiss the opinions of even the most unassailable expert witnesses. To make a long story short, it’s because jurors often don’t trust experts—and more frequently don’t understand them. This may be a frightening reality for most attorneys, who often rely on the content of expert witnesses to convince their jury. But this month, it gets worse. Just because your experts can’t win trials for you doesn’t mean that they can’t LOSE trials for you; they can, and often do, destroy the credibility of your case.

Abandon any hopes that your jurors will decide trials based on the evidence alone, especially the evidence that both sides know to be the most relevant. Jurors largely decide trials by judging the perceived honesty and motivations of the litigants and witnesses and by favoring the side whose case aligns with their prior beliefs and personal values. Oftentimes, the issues they choose to focus on are less relevant to liability and more about assessing credibility. But for all the imperfections inherent in jury decision-making, I find that jurors are often the best BS detectors in the courtroom. Most jurors have a well-developed sense of when a witness is nervous, defensive, dodging questions, and making excuses. Oftentimes a witness may lose credibility with the jury even though the content of their testimony has done nothing to damage their case, which is why attorneys are often baffled by jury verdicts. An expert witness who fails to understand that jurors are the best experts at knowing when a witness is uncomfortable, evasive, defensive, or too stubborn to make concessions can destroy their own credibility, not to mention the credibility of their (and your) case.

As brilliant as they are, too many expert witnesses have flaws that leave them vulnerable to crafty cross-examinations. First, experts are taught to believe that they must defend their expert opinions and conclusions under any circumstance. Second, experts are usually too confident and stubborn to admit when they’re wrong and change their position during cross. In front of a jury, this can be a toxic combination. Jurors may not understand the complexities of engineering, surgery, or corporate finance, so they rely heavily on their own common sense in evaluating how believable and credible experts are. When an expert stubbornly clings to his/her published opinion in contrast to what appears to be obvious common sense, the effect on the jury is often devastating.

I have seen witnesses say some remarkably foolish things in depositions and trial that completely lost the jury. An executive in a plaintiff’s company suing for stolen trade secrets insisted that even business cards acquired during the course of employment were the employer’s property and trade secrets; when the defense attorney handed the witness the business cards of two individual defendants in the case and asked if those were now plaintiff’s property and protected trade secrets, he insisted they were. Defense medical experts will often insist that an injury had nothing to do with a serious accident the day before, while plaintiff’s medical experts will try to convince the jury that a pre-existing

condition had nothing to do with a nearly-identical condition a few years later. I've seen real estate appraisers in commercial and eminent domain trials insist that properties were worth far more than prices that didn't produce buyers, and in other cases worth far less than what a buyer actually paid. No matter how well reasoned and grounded in evidence, many expert witnesses take positions at odds with common sense, and common sense is usually the only tool available to jurors.

Because you understand the case, you may not see an expert appearing foolish as fatal, especially if the subject matter has little to do with the relevant issues in the case. But to a juror, how can they trust and believe someone whose agenda is so biased that they refuse to think or answer rationally? Jurors have no choice but to brand that witness as ignorant, foolish, or dishonest, and if the witness can be so obviously wrong on one issue, how can he/she be trusted on any other material issue?

Before every trial, spend some time un-training your expert witnesses. Many are wonderful with juries and can think on their feet, but many others need to be trained that jurors put more stock in their confidence, willingness to answer, ability to make sense, and credibility than the content of their opinion and testimony. Convince them that they NEED to come across as open, comfortable, and helpful during cross examination. Convince them to concede points to opposing counsel at times if asked to choose between an opinion and common sense, but to politely point out that counsel has misunderstood the expert's message and to clarify it for them in a way that makes common sense. In a patent case, for example, let your experts know it is better to concede that two competing products are identical in many ways, but that the ways they were developed and the ways they work are very different, than to stubbornly insist that the products are totally different when the jurors see little but similarities. Remind your experts that each of them has a simple, valuable message that, for better or worse, the jurors can't distinguish from the messenger. Convince your experts that their easiest job is to deliver their message and that their most important job is to maintain their credibility.

The silver lining, of course, is that you have the opportunity to destroy your opposing counsel's case by discrediting your opposing experts. Regardless of an expert's message, jurors will discredit the expert and discard the message if you can get the expert to sweat. Asking challenging, unexpected questions that make an opposing expert hesitate or appear flustered is incredibly effective—jurors don't like it when experts lose confidence or take too much time to answer.

Many experts believe that the antidote to drowning in flop sweat is to calmly divert questions and look for reasons to avoid answering them. Many are expert at effortlessly dodging questions, insisting that "I wasn't asked to look into that" or simply repeating their conclusions. Make sure that your jurors notice when an expert is skillfully dodging questions—most jurors don't notice at first, but they react negatively when they realize that an expert won't answer a simple question, so make your question simple enough that your jurors believe even THEY could answer it. When a highly-credentialed expert claims he/she can't, the jurors take notice.

Asking questions in such a way that force the expert to choose between a logical consequence of their opinion and perceptions of common sense is often deadly for experts. If the expert stubbornly clings to a ridiculous position, they lose credibility. If the expert concedes he/she is wrong and flips their position, the jurors will pay extra attention—jurors put great stock in moments where a defense witness makes a strong point for the plaintiff, or vice versa. Choose your questions carefully, of course; if an expert can find a flaw in your argument or convince the jury that you lack common sense, they'll save themselves. Fortunately for the attorneys, many experts are too stubborn to equivocate; test the expert in depositions, and if you get the sense they have a stubborn streak, use these techniques at trial accordingly.

Harry Plotkin is a jury consultant in Los Angeles. Mr. Plotkin specializes in jury research, assisting trial attorneys in jury selection, and developing persuasive trial themes and opening statements. He can be reached at 626-975-4457 and at harry@yournextjury.com.